Supreme Court, U.S.
FILED
OCT 7 2002
CLERK

No. 02-332

In The

Supreme Court of the United States

JACK COMBS,

Petitioner,

vs.

FAIR HOUSING OF MARIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals' judgment merits review by this Court, given that the decision is consistent with this Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and with all post-*Havens* appellate decisions, which have uniformly upheld standing whenever a fair housing organization such as respondent is forced to devote resources to counteract the defendant's discrimination.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTRODUCTION	1
STATEMENT OF THE CASE	2
A. Combs' Discriminatory Conduct	3
B. Combs' Discovery Abuses	5
C. Proceedings Below	7
REASONS FOR DENYING THE WRIT	11
I. The Circuits Uniformly Agree That Standing Exists When A Fair Housing Organization Devotes Resources to Counteract Discrimination	12
A. Congress contemplated enforcement of the Fair Housing Act by fair housing organizations	12
B. Standing under the Fair Housing Act is established by a showing of the need to counteract discrimination	13
C. The Court of Appeals' judgment should be affirmed because the default established the facts supporting Fair Housing's standing as true	15
D. There is no circuit conflict regarding whether a fair housing organization may establish standing based upon remedial activities necessary to counteract a defendant's discrimination	17

TABLE OF CONTENTS – Continued

Page

II. This Case Does Not Raise the Issues of Whether A Fair Housing Organization May Establish Standing Based on a Diversion of Resources to A Pre-Litigation Investigation Alone or Expenses Associated with Litigation Alone 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES:

Alexander v. Riga, 208 F.3d 419 (3d Cir. 2000), *cert. denied*, 121 S.Ct. 757 (2001) 13

Arkansas ACORN Fair Housing, Inc. v. Greystone Development Co. Ltd., 160 F.3d 433 (8th Cir. 1998) 18, 22, 23

Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Health Retardation Ctr. Board of Trustees, 19 F.3d 241 (5th Cir. 1994) 23

Central Ala. Fair Hous. Ctr. v. Lowder Realty Co., Inc., 236 F.3d 629 (11th Cir. 2000) 18, 21, 22

Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp., 28 F.3d 1268 (D.C. Cir. 1994) 20, 21, 23, 24

Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers, 141 F.3d 71 (3d Cir. 1998) 18, 20, 21, 23, 24

Friends of the Earth v. Laidlaw Envtl. Serv., 528 U.S. 167 (2000) 13

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) ..... *passim*

Hooker v. Weathers, 990 F.2d 913 (6th Cir. 1993) 18, 23

Insurance Corp. of Ireland v. Companie des Bauxites de Guinee, 456 U.S. 694 (1982) 16

Louisiana ACORN Fair Hous. v. LeBlanc, 211 F.3d 298, (5th Cir. 2001), *cert. denied*, 532 U.S. 904 (2001) 18, 24

Pope v. United States, 323 U.S. 1 (1944) 15

TABLE OF AUTHORITIES – Continued

Page

Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898 (2d Cir. 1993) 18, 23

Spann v. Colonial Village, Inc., 899 F.2d 24 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 980 (1990) 18, 20, 21, 24

Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) 13

Village of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990) 22, 23

STATUTES:

42 U.S.C. § 3602(d) 12

42 U.S.C. § 3602(i)(1) 12

42 U.S.C. § 3613(a) 12

INTRODUCTION

This case is an action under the Fair Housing Act and related federal and state fair housing laws brought by respondent Fair Housing of Marin ("Fair Housing"), a non-profit community fair housing organization, against petitioner Jack Combs for illegal housing discrimination based on race. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), this Court held that a fair housing organization had standing when it "had to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices." *Id.* at 379. Applying the standards for organizational standing in *Havens* and followed by the other courts of appeals, the courts below concluded that Fair Housing has standing because Combs' discrimination required it to devote resources to programs and activities to counteract the effects of Combs' discrimination *above and beyond investigation or litigation*.

Nothing in this case warrants review by this Court. The result in this case does not involve a conflict among the circuits nor is it contrary to any of the decisions of this Court. Fair Housing would have organizational standing under the test developed in each of the circuit courts of appeals, all of which agree (in accordance with *Havens*) that the need to expend resources to counteract the effects of a defendant's discrimination constitutes a sufficient injury to confer standing upon a fair housing organization.

Insofar as there is a conflict among the circuits on whether standing can be based on a diversion of resources to a pre-litigation investigation alone or to expenses associated with litigation alone, this case is not the vehicle

that will allow the Court to resolve such questions. Although the decision below addressed diversion of resources to an investigation, this ground was alternative to the ground on which there is no conflict: Fair Housing's efforts to counteract Combs' discrimination.

The petition thus has no merit. It actually represents – after five years of contentious litigation – a final attempt by Combs to avoid responsibility for the consequences of his discriminatory acts as a landlord and his repeated discovery abuses.

STATEMENT OF THE CASE

Respondent Fair Housing brought this action for illegal housing discrimination based on race against petitioner Combs. Fair Housing is a non-profit community fair housing organization. It is engaged in several different activities to further its mission of promoting equal housing opportunities, including: education programs in the community regarding fair housing, training programs for real estate professionals, research regarding housing discrimination in the community, advocacy for affordable housing, and fair housing counseling. Beginning in 1994, Fair Housing received five complaints of race discrimination from tenants at Combs' apartment complex, Waters Edge. Fair Housing responded by conducting an investigation using fair housing testers, which verified that discrimination was occurring at Waters Edge. As a result of Combs' discrimination, Fair Housing also took other action to counteract Combs' discrimination by assisting in the formation of a County Supervisor's Task Force on Housing Discrimination. Fair Housing then filed an action against

Combs to enforce federal and state fair housing laws prohibiting discrimination based on race.

The testimonial and demographic evidence developed both before and after the filing of the lawsuit established that Combs engaged in intentional housing discrimination in violation of federal and state law by having, in his own words, "a white building." The district court found that Fair Housing had standing and later sanctioned Combs for discovery abuses by striking his answer and entering default judgment against him prior to trial. The district court subsequently awarded Fair Housing compensatory and punitive damages and attorneys' fees.

A. Combs' Discriminatory Conduct

The evidence that Fair Housing adduced in support of its prove-up of the default judgment showed that Combs intentionally engaged in racial discrimination in housing against African-Americans.

In 1994, Fair Housing of Marin received two complaints of discrimination. Pet. App. at 30. The first was a complaint from an African-American tenant who alleged that Combs served her with multiple written demands to leave Waters Edge Apartments for reasons she believed to be solely racial. *Id.* The second complaint was from a white tenant of Waters Edge alleging that Combs was excluding African-Americans. *See id.*

In response to these two complaints, Fair Housing conducted two sets of controlled tests wherein an African-American tester was shown a unit at Waters Edge followed by a white tester. *Id.* In the tests, which were conducted in the fall of 1994 and the spring of 1995, Combs encouraged

the white testers to rent the apartment. *Id.* at 30-1. Combs described the complex to one white tester as a "white building" and stated that he had problems with African-American tenants in the past and no longer rented to them. *Id.* at 30. He told the other white tester that, if she moved in immediately, he would waive the rent for the remainder of the month. *Id.* He did not encourage the African-American testers to apply. *Id.* Testing also documented other disparate treatment between the African-American and white testers. Subsequently, in 1995, Fair Housing received three other complaints of racial discrimination at Waters Edge Apartments, including one from an African-American tenant who alleged that she was served with multiple eviction notices. *Id.* at 31.

Several tenant witnesses submitted sworn declarations testifying that Combs had told them he did not want to rent to African-Americans and that he wanted to have an "all-white building." For example, Combs told a tenant with managerial duties at Waters Edge that he wanted Waters Edge to be an all-white building. *See id.* On one occasion, Combs asked a prospective tenant if her husband and children were white. He told her that he did not like "niggers" and that there were no African-Americans in his building. Later, Combs told her: "I don't want niggers in my building. I own it. I'll have who I want." *Id.* at 31. Combs told yet another tenant that he hated the way the law works because it required him to rent to "nigger people." He said his way of getting around the law was that if the prospective tenants were African-American, he would tell them that their credit was not good. SER 767.

When Combs acquired Waters Edge in 1992, approximately 20% of the households in Waters Edge contained at least one African-American. SER 478. Two of the last

remaining African-American tenants believed that Combs evicted them because of their race. One declared that Combs did not like her African-American friends working on her car in the parking lot. Although white people worked on their cars in the Waters Edge parking lot, Combs told her she had to get out after he saw her African-American friends working on the car. SER 768-70.

At the time of entering into a rental agreement with another African-American tenant, Combs had not met her or her family and had no reason to know they were African-Americans. SER 764-5. The tenant declared that when Combs first met her, however, he said, "This is never going to work" and Combs eventually refused to renew her family's lease for reasons that she attributed to his racial prejudice. SER 765.

The racial composition of the tenants of Waters Edge reflected that Combs' statements to the white tester and white tenants were true: after renting to significant numbers of African-Americans in 1993, the number of African-Americans residing at Waters Edge dropped precipitously. In 1993, African-Americans resided at Waters Edge for a total of 41 months. SER 479. By 1996, an African-American resided at Waters Edge for only one month. *Id.* By 1997, no African-American tenants resided at the apartment complex. *Id.*

B. Combs' Discovery Abuse

The district court granted Fair Housing's motion to compel in early 1998 based on Combs' failure to respond to discovery requests seeking basic information and documents about tenants and prospective tenants of Waters Edge. ER 22 A-D. In response to the motion, Combs

represented to the court that certain categories of documents such as leases, applications, tenant rosters, and documents reflecting inquiries from prospective tenants did not exist. *Id.*

After the issuance of the court order, Combs continued to refuse to produce the information and documents ordered. The magistrate judge granted Fair Housing's motion requiring compliance with her prior order and warned that if Combs failed to comply with the order, she would recommend that a default be entered. ER 25.

After Combs failed to comply with the court's second order, the magistrate judge recommended that a default be entered, but the district court judge declined to enter a default and awarded monetary sanctions instead. Pet. App. at 32. The court nonetheless warned Combs that any further discovery abuse may result in the imposition of terminating sanctions. *Id.*

Believing, based on Combs' representations, that all documents had finally been produced, Fair Housing noticed the depositions of Combs and his wife. During the deposition, which occurred only a few weeks before the scheduled trial date, Fair Housing discovered that documents reflecting tenant inquiries, leases and tenant rosters did in fact exist, although Combs and his counsel had previously represented to the magistrate judge and Fair Housing that they did not. All of the documents were kept near Combs' desk in his one-bedroom home. ER 126.

The district court granted Fair Housing's motion for terminating sanctions, struck the answer, and entered a default against Combs. Pet. App. at 32. The district court ordered the terminating sanctions "in response to defendant's repeated and egregious abuses of civil discovery,

and Combs' failure to heed the clear warning provided over a half-year earlier." *Id.* After discussing the applicable legal principles, the court concluded that Combs' failure to produce documents met the "willfulness, bad faith, or fault of the party" requirement, that Fair Housing had suffered "inescapable prejudice as a result of Combs' gamesmanship" because important, time-sensitive documents had been produced shortly before trial which should have been produced more than a year earlier, and that no lesser or alternative sanction was appropriate. ER 126-9.

C. Proceedings Below

At the outset of the case, Combs moved to dismiss Fair Housing's claims for lack of standing. The district court rejected the defendant's motion. The court held that the allegations of the complaint were no different from those alleged in *Havens*. The district court held that Fair Housing alleged that its ability to promote fair housing through counseling was impaired by the Combs' conduct and therefore Fair Housing alleged sufficient facts to support Article III standing. Pet. App. at 24.

After default was entered against Combs for his repeated discovery abuses, the district court held a hearing on Fair Housing's motion for default judgment and took evidence to establish the amount of damages. Combs did not contend that Fair Housing lacked standing in response to Fair Housing's motion for default judgment.

To support the allegations pled in the complaint, Fair Housing submitted affidavits of the testers and tenant witnesses and statistical information demonstrating the decreasing number of African-American tenants at Waters Edge Apartments. The court concluded that Combs had

engaged in intentional racial discrimination. The court stated that "while direct evidence of racial animus is relatively rare, it is amply present on this record." Pet. App. at 33.

The district court next awarded compensatory damages. The district court found that the complaints Fair Housing received about Combs' practices diverted its time and resources from "planned education and counseling programs," *see* Pet. App. at 34, and "Combs' activities did harm to [Fair Housing's] organizational mission to 'ensure equal housing opportunities and to educate the community on the value of diversity in our neighborhoods,'" *see* Pet. App. at 36.

The district court awarded damages to Fair Housing based on its efforts to counteract Combs' discrimination. The district court awarded damages for the diversion of resources from Fair Housing's planned education and outreach activities to the formation of, and participation in, a county supervisor's task force on housing discrimination. The planned activities and programs which Fair Housing was unable to complete included: (1) expanded adult education programs to community groups not yet reached by Fair Housing's outreach programs and activities; (2) outreach to government officials regarding fair housing laws and services provided by Fair Housing; (3) increased media outreach regarding fair housing laws and Fair Housing's services. SER 491-92. The damages were based on the staff time expended on the task force. Pet. App. at 34.

In awarding these damages, the district court specifically examined the causal connection between Combs' discriminatory practices and the need for remedial efforts

in the form of the supervisor's task force to counter that discrimination. Pet. App. at 36. The district court agreed with Fair Housing's claim that Combs' discrimination was one of the factors that caused it to recognize that there was a need for the formation of a supervisor's task force consisting of governmental and community organizations to combat the problem of housing discrimination in Marin County. *See* SER 491. The district court, however, excluded from its damage award the costs of activities the court did not believe resulted from Combs' conduct. Pet. App. at 36.

The district court also awarded damages for the costs of the design, printing and dissemination of literature aimed at counteracting the impact of Combs' discrimination on the housing market. Pet. App. at 37-8. The district court noted that "[a] fair housing organization may suffer redressable injury to its 'non-economic interest in encouraging open housing.'" *Id.* at 36, *citing Havens*, 455 U.S. at 379 n.20. The district court explained that to recover damages for harm to the interest in encouraging open housing, "a fair housing organization must establish that expenditures in education, counseling and/or outreach are necessary to counterbalance the effects of a defendant's discriminatory practices." Pet. App. at 36-7. The district court agreed with Fair Housing that Combs' activities caused harm to its mission of ensuring equal opportunity in housing that could be cured through significant outreach. Pet. App. at 36. The district court again closely examined the causal link between Combs' conduct and the need for remedial out-of-court efforts and awarded only those damages sufficient to redress the harm to Fair Housing's mission. Pet. App. at 37.

Finally, the district court awarded damages for the diversion of resources from Fair Housing's planned education and outreach activities to community groups, government officials and the media, SER 491-2, to a pre-litigation investigation of Combs' discrimination and staff efforts assisting the litigation of this action. Pet. App. at 34. The district court based its award of damages on the staff time expended in investigating Combs' discrimination and assisting with the litigation of this action, testing expenses, and tester recruitment and training costs. *Id.*

The Ninth Circuit affirmed the district court's decisions in their entirety. Pet. App. at 1. Judge Paul H. Roney, Senior Circuit Judge for the Eleventh Circuit sitting by designation, wrote the decision for a unanimous panel. The court explained that in *Havens* this Court held that a fair housing organization had standing where it devoted significant resources to identifying and counteracting discriminatory steering practices. Pet. App. at 4 (*citing Havens*, 455 U.S. at 379). Applying *Havens* and following the lead of the other circuit courts of appeals, the court held that "[t]he record supports the district court's findings that Fair Housing's resources were diverted to investigating and other efforts to counteract Combs' discrimination above and beyond litigation." Pet. App. at 9. The court also affirmed the finding that Fair Housing suffered damages which required efforts to counteract Combs' discrimination in the form of "the design, printing, and dissemination of literature aimed at redressing the impact Combs' discrimination had on the Marin housing market. *Id.*

Contrary to Combs' assertions, the court of appeals did not ally itself with "the circuits that have taken the most liberal interpretations of Havens Realty." Pet. at 9. In affirming the district court's decisions, the court of

appeals held that "*it is not necessary here to conflict with those cases which suggest that litigation expenses alone do not establish standing.*" Pet. App. at 8 (emphasis added). It held that the cases cited by Combs from the Third, District of Columbia, and Fifth Circuits for the proposition that Fair Housing lacked standing were distinguishable but explained that the "*law of those circuits is not different from the law we apply here.*" Pet. App. at 5 (emphasis added). The court followed "the lead of the other circuits which have upheld organizational standing for fair housing groups" and concluded that Fair Housing had standing. Pet. App. at 8.

REASONS FOR DENYING THE WRIT

Combs contends that this case presents the question whether a fair housing organization may establish standing based on the diversion of resources to a pre-litigation investigation or to litigation. Pet. at i.

Combs mischaracterizes this case and the nature of the disagreement among the circuits. There is no "significant conflict among the circuits," Pet. at 9, about whether a fair housing organization has standing when it expends resources to counteract the effects of a defendant's discrimination. That issue was settled by this Court twenty years ago in *Havens*, 455 U.S. at 379. Following *Havens*, the federal courts of appeals uniformly agree that standing can be established by proof that a fair housing organization expended resources on out-of-court activities designed to remedy the effects of a defendant's illegal discrimination. In this case, the Ninth Circuit affirmed the determination that an outreach program was necessary to

counteract the effects of Combs' discrimination. Pet. App. at 9. The court also affirmed the findings that Fair Housing counteracted Combs' discrimination by expending resources on formation of, and participation in, a county-wide supervisor's task force on housing discrimination. *Id.*

Combs contends that the Third, Fifth and District of Columbia Circuits have questioned standing based on a diversion of resources to a pre-litigation investigation alone or expenses associated with litigation alone. However, these cases are inapposite here because these very same circuits have expressly held that a fair housing organization may have standing based on the need to devote resources to counteract a defendant's discrimination. Fair Housing thus has standing based on the independent ground that it needed to expend resources to counteract Combs' discrimination.

I. THE CIRCUITS UNIFORMLY AGREE THAT STANDING EXISTS WHEN A FAIR HOUSING ORGANIZATION DEVOTES RESOURCES TO COUNTERACT DISCRIMINATION.

A. Congress Contemplated Enforcement of the Fair Housing Act by Fair Housing Organizations.

The Fair Housing Act provides for enforcement through civil actions by "aggrieved persons." 42 U.S.C. § 3613(a) ("An aggrieved person may commence a civil action * * *."). It defines an "aggrieved person" as "any person who has been injured by a discriminatory housing practice." 42 U.S.C. § 3602(i)(1). The Act defines "person" to include "corporations," "associations," and "unincorporated organizations." 42 U.S.C. § 3602(d). The Act thus

provides for enforcement actions by organizations such as Fair Housing, a non-profit corporation. *See Alexander v. Riga*, 208 F.3d 419, 427 n.4 (3d Cir. 2000), *cert. denied*, 531 U.S. 1069 (2001) (Fair housing organization was an "aggrieved person" under the Act.). In bringing such actions, fair housing organizations act as "private attorneys general in vindicating a policy Congress considered to be of the highest priority." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972).

B. Standing Under the Fair Housing Act Is Established by a Showing of the Need to Counteract Discrimination.

In enacting the Fair Housing Act, Congress intended to define standing as broadly as permitted by Article III of the Constitution. *Id.* at 209. The sole requirement for standing under the Act "is Article III minima injury in fact: that the plaintiff allege that as a result of the defendant's actions he suffered a 'distinct and palpable injury.'" *Havens*, 455 U.S. at 372.

To establish standing under Article III of the Constitution, a plaintiff must show:

> (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth v. Laidlaw Envtl. Serv., 528 U.S. 167, 180-81 (2000).

This Court applied these principles in *Havens* to hold that a fair housing organization had standing. In *Havens*, the plaintiffs sued a realty company and one of its employees for steering African-American home seekers. The plaintiffs included a fair housing organization, Housing Opportunities Made Equal ("HOME"). HOME's mission was to make equal opportunity housing a reality. *Id.* at 368. Just as is true of Fair Housing, HOME's activities "included the operation of a housing counseling service and the investigation and referral of complaints concerning housing discrimination." *Id.* Similarly, just as occurred here, HOME had conducted testing of defendants' real estate practices and sued after the tests and other investigation revealed discriminatory conduct.

HOME's complaint alleged that it had been "frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services" and "had to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices." *Id.* at 379. The Court concluded that if the allegations were true, there was no doubt that the organization suffered injury in fact:

> In determining whether HOME has standing under the Fair Housing Act, we conduct the same inquiry as in the case of an individual: Has the plaintiff "'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction."

Id. at 378-79 (citations omitted).

Under this test, standing clearly existed:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability

> to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such a concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's resources – constitutes far more than simply a setback to the organization's abstract social interests.

Id. at 379.

The Court explained that standing may be based on an injury to an organization's mission. As the Court held, "[t]hat the alleged injury results from the organization's noneconomic interest in encouraging open housing does not affect the nature of the injury suffered, and accordingly does not deprive the organization of standing." *Id.* at 379 n.20 (citation omitted).

C. The Court of Appeals' Judgment Should Be Affirmed Because the Default Established the Facts Alleged in the Complaint Supporting Fair Housing's Standing As True.

Fair Housing obtained a default against Combs for his repeated discovery abuses. Pet. App. at 32. The default entered against Combs prevented him from controverting the allegations of the complaint except those allegations going to the amount of damages. *Pope v. United States*, 323 U.S. 1, 12 (1944). At the hearing on Fair Housing's motion for default judgment, Combs did not contend that Fair Housing lacked standing or that it was required to adduce additional evidence in support of its standing allegations. *See* Pet. App. at 29.

In its complaint, Fair Housing alleged that one of its "activities in combating illegal housing discrimination is to provide 'outreach and education to the community regarding fair housing.'" Pet. App. at 9. Fair Housing also alleged that "as a result of defendant's discriminatory practices, it has suffered injury to its ability to carry out its purposes * * * and in the inability to undertake other efforts to end unlawful housing practices." *Id.*

These allegations mirror the allegations of the fair housing organization in *Havens*, which the Court found were sufficient to confer standing. In both cases, the fair housing organizations alleged that the defendant's discrimination injured their ability to conduct their programs and activities. Compare *Havens*, 455 U.S. at 379 ("Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services.") with Pet. App. at 9 ("[A]s a result of defendant's discriminatory practices, it has suffered injury to its ability to carry out its purposes * * *."). Similarly, in both cases, the fair housing organizations alleged that their resources were diverted from other activities and programs. Compare *Havens*, 455 U.S. at 379 ("Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices.") with Pet. App. at 9 ("[A]s a result of defendant's discriminatory practices, it has suffered injury * * * in the inability to undertake other efforts to end unlawful housing practices.").

Thus, to the extent that the facts supporting standing may be taken as true as a result of the default, the judgment below must be affirmed without regard to any split in the circuits. *Cf. Insurance Corp. of Ireland, Ltd. v.*

Companie des Bauxites de Guinee, 456 U.S. 694 (1982) (well-pleaded facts going to personal jurisdiction may be taken as true as a discovery sanction but distinguishing personal jurisdiction from subject matter jurisdiction).

D. There Is No Circuit Conflict Regarding Whether a Fair Housing Organization May Establish Standing Based Upon Remedial Activities Necessary To Counteract A Defendants' Discrimination.

Even if Fair Housing's standing was not established by the default, certiorari is unwarranted. Combs contends that Fair Housing does not have standing because merely diverting or allocating resources, without more, is insufficient to establish injury in fact. Pet. at 15. To support his proposition, Combs cites cases from the Third, Fifth and District of Columbia Circuits but notes that other courts of appeals have held otherwise. Pet. at 16-20.

Combs mischaracterizes the nature of the conflict among the circuits and the nature of this case. The courts of appeals agree that the need to expend resources for out-of-court remedial activities to counteract a defendant's discrimination is sufficient to establish standing under *Havens*. As the Third Circuit has explained:

> In deciding organizational standing questions after *Havens*, appellate courts have generally agreed that where an organization alleges or is able to show – depending on the stage of the proceeding – that it has devoted additional resources to some area of its effort in order to counteract discrimination, the organization has met the Article III standing requirement.

Fair Hous. Council of Suburban Philadelphia v. Montgomery Newspapers, 141 F.3d 71, 78 (3d Cir. 1998); *see Central Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co., Inc.*, 236 F.3d 629, 642 (11th Cir. 2001); *Arkansas ACORN Fair Housing v. Greystone Development, Ltd.*, 160 F.3d 433, 434 (8th Cir. 1998); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993); *Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993) (Fair housing organization may establish standing by alleging "an injury arising from a 'purportedly illegal action [that] increases the resources the group must devote to programs independent of the suit challenging the action.'").

Combs concedes that out-of-court remedial activities necessary to counteract a defendant's discrimination are sufficient to establish standing even in circuits (the Third, Fifth and District of Columbia) that Combs cites as taking stricter views of organizational standing. Pet. at 16-20; *see Louisiana ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2001), *cert. denied*, 532 U.S. 904 (2001) ("[A]n organization could have standing if it had proven a drain on its resources resulting from counteracting the effects of the defendant's actions."); *Fair Hous. Council of Suburban Philadelphia*, 141 F.3d at 78 ("[W]here an organization alleges or is able to show – depending on the stage of the proceeding – that it has devoted additional resources to some area of its effort in order to counteract discrimination, the organization has met the Article III standing requirement."); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) ("*Havens* makes clear, however, that an organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action.").

Fair Housing's Article III standing in this case was determined precisely on the ground on which all the circuits agree. The Ninth Circuit held that Fair Housing had standing based on its out-of-court remedial efforts to counteract Combs' discrimination, which went beyond expenses associated with litigation. Pet. App. at 9. This determination by itself is sufficient for Fair Housing to establish standing under *Havens* in any of the circuits that have addressed the issue of organizational standing.

Combs argues that Fair Housing failed to demonstrate any harm to its mission or its activities from its efforts to counteract Combs' discrimination Pet. at 29. Combs also contends that Fair Housing's injuries were self-inflicted. Combs' assertions lacks merit.

Combs' contentions are highly fact bound and contradict the findings of the courts below. The court of appeals held that the record supported the determination that Fair Housing demonstrated an injury to its mission and its programs and activities caused by Combs that required it to expend resources to conduct an outreach campaign and form the supervisor's task force on housing discrimination. Pet. App. at 9, 34 and 36. In awarding damages, the district court agreed that "Combs' activities did harm to their organizational mission to 'ensure equal housing opportunity and to educate the community on the value of diversity in our neighborhoods.'" *Id.* at 36. The district court awarded damages to remedy this injury by awarding Fair Housing damages to cover the cost of the "design, printing and dissemination of literature aimed at redressing the impact Combs' discrimination had on the Marin housing market." *Id.* at 37. The goal of the outreach campaign was to locate people who may have been affected

by Combs' discrimination and provide them with counseling. SER 500. The district court rejected Combs' argument that there was no causal link between Combs' discriminatory practices and any impairment of Fair Housing's mission or any need for remedial efforts. *See* Pet. App. at 37.

The district court also awarded damages for the time and effort expended in founding and participating in the supervisor's task force on housing discrimination. The court of appeals affirmed the finding that the complaints Fair Housing received regarding Combs' discrimination caused a diversion of its resources away from planned education and counseling programs. Pet. App. at 9, 34.

The determinations of the courts below are consistent with established law developed by the courts of appeals. The courts of appeals have held – in accord with the express holding of *Havens* – that a fair housing organization suffers harm to its mission and its programs and activities sufficient to establish standing under Article III when it must devote increased resources to counteracting a defendant's discrimination. *Spann*, 899 F.2d at 27; *Fair Hous. Council of Suburban Philadelphia*, 141 F.3d at 79.

The courts of appeals have explained that the need to counteract a defendant's discriminatory housing practices is a "manifestation of the injury that those practices had inflicted upon 'the organization's noneconomic interest in encouraging open housing' * * *." *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994), *quoting Havens*, 455 U.S. at 379 & n.20. The programs and activities to counteract a defendant's discrimination are necessary because the

defendant's illegal discrimination injured the organization's mission and its programs by increasing "the number of people in need of counseling," reducing "the effectiveness of any given level of outreach efforts" or generally making its "overall task more difficult." *Fair Employment Council of Greater Washington, Inc.*, 28 F.3d at 1276.

Injuries incurred from counteracting a defendant's discrimination are not voluntary, self-referential or self-inflicted. *See Spann*, 899 F.2d at 27 (drawing a distinction between an organization manufacturing injury by the expenditures of resources on the lawsuit and where illegal action requires an organization to increase the resources the group must devote to other programs); *Fair Hous. Council of Suburban Philadelphia*, 141 F.3d at 79 (same). When a fair housing organization acts to counteract a defendant's discrimination, the organization does not inflict its own injury. *See Central Ala. Fair Hous. Ctr., Inc.*, 236 F.3d at 642. Instead, the injury is inflicted by the defendant because he engaged in discriminatory housing practices, *id.*, which the fair housing organization must counter to avert further harm to its mission.

Thus, there is no circuit conflict on the question whether a fair housing organization may establish standing based on the need to counteract a defendant's discrimination. The court of appeals held that Fair Housing had standing based on this independent ground. The availability of this well established, independent ground for decision weighs against review.

II. This Case Does Not Raise the Issues of Whether A Fair Housing Organization May Establish Standing Based on a Diversion of Resources to A Pre-Litigation Investigation Alone or Expenses Association with Litigation Alone.

Combs contends that this case raises a question that he claims has split the circuits – whether a fair housing organization may establish standing based on a diversion of resources to a pre-litigation investigation *alone* or diversion of resources to expenses associated with litigation *alone*. Combs is incorrect.

Most of the circuits have permitted standing based on such injury. The Second, Third, Sixth, Seventh, Eighth and Eleventh Circuits permit standing based on a diversion of resources to an investigation of discriminatory practices. *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) ("*Havens* makes clear * * * that the only injury that need be shown to confer standing on a fair-housing agency is deflection of the agency's time and money from counseling to legal efforts directed against discrimination. These are the opportunity costs of discrimination, since although counseling is not impaired directly there would be more of it were it not for the defendant's discrimination."); *Central Ala. Fair Hous. Ctr.*, 236 F.3d at 642 ("When a fair housing organization expends resources as a proximate result of the defendant's discriminatory conduct, and those resources would have been devoted to other activities consonant with its mission were it not for the offending conduct, it suffers injury * * *."); *Arkansas ACORN Fair Hous., Inc. v. Greystone Dev., Ltd.*, 160 F.3d 433, 434-5 (8th Cir. 1998) ("[T]he deflection of an organization's monetary and human

resources from counseling or educational programs to legal efforts aimed at combating discrimination, such as monitoring and investigation, is itself sufficient to constitute an actual injury * * *."); *Fair Hous. Council of Suburban Philadelphia*, 141 F.3d at 78; *Ragin*, 6 F.3d at 905; *Hooker*, 990 F.2d at 915.

The Second, Seventh and Eighth Circuits also appear to permit standing based on the diversion of resources to expenses associated with litigation. *See Ragin*, 6 F.3d at 905; *Village of Bellwood*, 895 F.2d at 1526; *Arkansas ACORN Fair Hous., Inc.*, 160 F.3d at 434-35.

Combs relies upon cases from the Third, Fifth and District of Columbia Circuits as reaching a contrary result. In *Fair Employment Council of Greater Washington, Inc.*, 28 F.3d 1268, the D.C. Circuit rejected the argument that the "mere expense of testing" constitutes injury-in-fact sufficient to establish standing for an organizational plaintiff. *Id.* at 1276.

In *Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Health Retardation Ctr. Board of Trustees*, 19 F.3d 241 (5th Cir. 1994), the Fifth Circuit held that "[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impact standing on the organization." *Id.* at 244.

Fair Hous. Council of Suburban Philadelphia involved an action brought by a fair housing organization against a newspaper and other defendants alleging that the newspaper had published discriminatory advertisements. The fair housing organization had not received any complaints from the public about the advertisements and could not

establish that reviewing advertisements was a departure from its normal, everyday activities. 141 F.3d at 78. The Third Circuit therefore held that the fair housing organization had not established evidence of a causal connection between the defendants' alleged discriminatory advertisements and the diversion of resources to an investigation. *Id.* The Third Circuit expressly recognized that a fair housing organization could establish standing based on a diversion of resources to an investigation if it could establish such a causal connection. *Id.* The Third Circuit, however, rejected the notion that a fair housing organization could establish standing based on a diversion of resources to expenses associated with litigation alone. It held that "pursuit of litigation *alone* cannot constitute an injury sufficient to establish injury under Article III." *Id.* at 79-80 (emphasis added).

However, as Combs concedes, *see* Pet. at 17-20, these same circuits have expressly recognized that out-of-court remedial efforts to counteract a defendant's discrimination are sufficient to confer standing upon a fair housing organization. *Louisiana ACORN Fair Hous.*, 211 F.3d at 305; *Fair Hous. Council of Suburban Philadelphia*, 141 F.3d at 78; *Fair Employment Council of Greater Washington, Inc.*, 28 F.3d at 1276; *Spann*, 899 F.2d at 27.

The courts below found standing based on this independent ground. This case thus does not involve a diversion of resources to a pre-litigation investigation alone or a diversion of resources to expenses associated with litigation alone. Instead, the courts below held that standing was established based on the very type of injury that *Havens* squarely held confers standing upon a fair housing organization – a fair housing organization's need to expend resources to counteract a defendant's discrimination. Pet.

App. at 9. The court of appeals therefore had no occasion to decide whether a diversion of resources to a pre-litigation investigation alone or a diversion of resources to expenses associated with litigation alone were sufficient to confer standing upon Fair Housing and there is no basis for granting certiorari in this case to decide those issues.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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